

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	Cr. ID No. 0906009926
)	
JOHN F. CRESTO,)	
)	
Defendant.)	

Decided: April 25, 2011

MEMORANDUM OPINION AND ORDER

Karin M. Volker, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State.

Jonathan Layton, Esquire, Wilmington, Delaware, Attorney for Defendant.

DAVIS, J.

Defendant John Cresto pled guilty in the Court of Common Pleas to three charges in the above-captioned matter. Mr. Cresto was sentenced to two years and thirty days at Level V with thirty days suspended. Mr. Cresto filed a motion for modification of sentence (the “Motion”) under the Court of Common Pleas Criminal Rule 35(b). For the reasons set forth in the opinion below, the Motion is DENIED.

FACTS AND PROCEDURAL HISTORY

Mr. Cresto was arrested on May 4, 2010 and charged with the following offenses: (i) two counts of assault 3rd in violation of 11 *Del. C.* § 611 (1); (ii) one count of resisting arrest in violation of 11 *Del. C.* § 1257; and (iii) two counts of criminal mischief under \$1000 property damage in violation of 11 *Del. C.* § 811 (a) (1). The charges arose from a domestic violence incident that occurred on June 12, 2009. According to the affidavit of probable cause, in that incident Mr. Cresto assaulted an ex-girlfriend and her sister, smashed a cell phone and two car windows, and then fled from the area when the police were called.¹

On August 18, 2010, Mr. Cresto appeared in the Court of Common Pleas and reached an agreement with the State to resolve the charges by way of a plea. Under the terms of the plea, Mr. Cresto plead guilty to one count of assault 3rd, one count of resisting arrest and one count of criminal mischief. The State entered nolle prosequi on the balance of the charges in this case as well as all charges in three separate cases pending against Mr. Cresto.² The State recommended a sentence of three years at Level V suspended for one year at Level II probation. During the plea colloquy, Mr. Cresto acknowledged that he understood that the Court is not bound by the State's recommended sentence and the sentencing judge would decide the sentence to be imposed.

The Court addressed sentencing immediately after accepting the plea. After hearing from the State and Mr. Cresto's Counsel, the Court allowed the victim's father to make an impact statement. During the impact statement, Mr. Cresto and the victim's father exchanged words directly with one another. The Court then determined that it needed additional information prior to sentencing Mr. Cresto and ordered a full presentence investigation and continued the

¹ Affidavit of Probable Cause in Adult Complaint and Warrant – Case No. 0906009926.

² Nolle Prosequi entered in Court of Common Pleas Case Numbers 0912000211, 0907000562, and 0907000545.

sentencing hearing to a later date. Prior to adjourning, the Court advised Mr. Cresto that he would have an opportunity to be heard at the later hearing.

The Court of Common Pleas Investigative Services Office conducted an investigation and prepared a presentence report prior to sentencing. That report was provided to the Court and the parties.³ Subsequent to receiving the report but prior to the continued sentencing hearing, the Court met with the investigative services officer who prepared the presentence report.

On October 1, 2010, Mr. Cresto appeared in the Court of Common Pleas for his sentencing hearing. Mr. Cresto apologized for his crimes and claimed he was remorseful for his actions. The State represented that it had discussed the matter with the victim's father and would now be seeking a term of two years at Level 5 suspended for Level III probation. The victim's father also addressed the Court and stated that Cresto has a drug problem and recommended drug treatment as part of the sentence.

Prior to handing down the sentence, the Court set out those things it considered for purposes of Mr. Cresto's sentencing. The Court stated that it had considered: (i) the recommendations from the Defendant and the State; (ii) the statements made by Mr. Cresto and the victim's father; (iii) the applicable Sentencing Accountability Commission ("SENTAC") guidelines; (iv) aggravating and mitigating circumstances; (v) Mr. Cresto's behavior leading to the convictions in this case; (vi) the presentence report; and (vii) Mr. Cresto's entire criminal record. The Court then announced it was deviating from the SENTAC guidelines based on certain aggravating circumstances. The Court identified the following aggravating circumstances on the record at the hearing: (i) this was Mr. Cresto's third resisting arrest charge in the past three years and the second resisting arrest charge within eighteen months; (ii) Mr.

³ The parties receive the same presentence report that is provided to the Court except that the Court also receives a one page recommendation regarding sentencing.

Cresto's manipulative behavior when he informed the investigating officer that he would not surrender unless there was an agreement not to pursue criminal charges; (iii) Mr. Cresto's extensive criminal history including nineteen felony convictions or adjudications of delinquent prior to the age of twenty three; (iv) three prior probation discharges as unimproved indicating Mr. Cresto is not amenable to community supervision; (v) Mr. Cresto's lack of remorse in the interview with the Court of Common Pleas investigative services officer (including, as noted in the report, that Mr. Cresto emphasized that his injury from breaking through a car window to punch the victim was worse than the injury suffered by the victim); and (vi) Mr. Cresto's undue depreciation of the offenses charged. The Court concluded that Mr. Cresto was in need of correctional treatment to address his repetitive criminal conduct. The Court then sentenced Mr. Cresto to a total of two years and thirty days at Level V and suspended thirty days with no probation to follow.

MR. CRESTO'S MOTION TO MODIFY THE SENTENCE

Mr. Cresto filed a motion for modification of sentence (the "Motion") and requested that the sentence be reduced to time served followed by supervised probation and anger management classes. Mr. Cresto claims he is entitled to modification because the original sentence imposed is outside of the presumptive sentence guidelines, the sentence was based on untrue assumptions, the Court improperly relied on the presentence report, and the presentence office failed to conduct a sufficient interview.

Mr. Cresto incorrectly mailed the Motion to the Prothonotary of the Superior Court instead of the Court of Common Pleas. The Prothonotary of the Superior Court received the Motion on January 10, 2011 and subsequently forwarded the motion to the Clerk of the Court of Common Pleas. The Clerk of the Court of Common Pleas received the Motion on January 19,

2011. The State then requested an opportunity to respond before the Court took any action on the Motion. The Court requested that the State and Defense Counsel submit arguments on the motion prior to March 1, 2011.

The State and Defense Counsel each submitted supplemental written arguments. The State opposes reducing Mr. Cresto's sentence because the State contends that the Superior Court gave deference to this Court's sentence in this case prior to sentencing Mr. Cresto on unrelated felony charges. In addition, the State asks the Court to deny the Motion because Mr. Cresto has an extensive criminal history, is not amenable to probation, and aggravating factors outweigh any mitigating factors in this particular case.

Mr. Cresto's Counsel also submitted an additional paper in support of the Motion. Mr. Cresto's Counsel's supplemental argument claims that modification is appropriate here because the Court improperly relied on "uncharged, unproven, uncorroborated, and unsubstantiated allegations with respect to alleged prior bad acts involving Mr. Cresto and the *alleged* victim,"⁴ the Court did not give Defense Counsel or Mr. Cresto the opportunity to respond to the victim's father's impact statement, the interview with the presentence investigator was cut short by corrections staff, the Court did not give proper weight to the fact that Mr. Cresto accepted responsibility for his actions by accepting a plea versus proceeding to trial on the charges, and the sentence exceeds SENTAC guidelines.

Concluding the record was complete, the Court declined to hold a hearing on the Motion.⁵

⁴ Mr. Cresto's Supplemental Motion (emphasis added). Although not necessary to the decision here, the Court wants to point out that it does not agree with Counsel's characterization that Ms. Jacobs is an alleged victim. Ms. Jacobs is a victim of Mr. Cresto's criminal conduct. Mr. Cresto plead guilty to the charges and has accepted responsibility for his crimes. The proper time to argue that Ms. Jacobs is "allegedly" a victim expired when Mr. Cresto chose to plead guilty.

⁵ Ct. Com. Pl. Crim. R. 35(b) ("A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the Court.")

I. ANALYSIS

Court of Common Pleas Criminal Rule 35 gives the court the ability to correct or reduce a sentence.⁶ Although Mr. Cresto's Motion is titled "Motion for Modification," the Court considers the Motion as a motion for correction or reduction of sentence under Court of Common Pleas Criminal Rule 35. The court may correct an illegal sentence at any time and it may correct a sentence imposed in an illegal manner within ninety days.⁷ A motion for reduction of sentence must be made within ninety days after the sentence is imposed.⁸ An application for sentence reduction or correction of a sentence imposed in an illegal manner made more than ninety days after imposition of a sentence will only be considered where extraordinary circumstances exist.⁹

COURT OF COMMON PLEAS RULE 35 TIME REQUIREMENTS

Mr. Cresto seeks a reduction of his sentence because the sentence imposed is outside the SENTAC guidelines, the sentence is based on inaccurate information, and the investigative services office did not properly prepare the presentence report. Mr. Cresto's Counsel filed a supplemental motion which identified an additional argument in support of a reduction of the sentence – that the Court allowed improper testimony from the father of the victim at Cresto's sentencing hearing. Mr. Cresto's arguments invoke the provision of Court of Common Pleas Criminal Rule 35 (a) involving a sentence imposed in an illegal manner.

As mentioned above, a motion to modify a sentence imposed in an illegal manner must be filed within ninety days after imposition of the sentence. Mr. Cresto was sentenced on October 1, 2010; and therefore, a timely motion under Court of Common Pleas Rule 35 was

⁶ Ct. Com. Pl. Crim. R. 35.

⁷ Ct. Com. Pl. Crim. R. 35(a).

⁸ Ct. Com. Pl. Crim. R. 35(b).

⁹ Ct. Com. Pl. Crim. R. 35.

required to be filed before December 30, 2010. Although the Motion is dated December 27, 2010, the Court did not receive the Motion until January 19, 2011.

Court of Common Pleas Criminal Rule 35 uses mandatory language that a motion filed more than ninety days after imposition will *only* be considered if extraordinary circumstances exist.¹⁰ Here, Mr. Cresto's request can only be timely if this Court applies a "mailbox rule" to the filing of the Motion. The Delaware Supreme Court has declined to create separate "mailbox rule" for prisoners when filing a notice of appeal.¹¹ For the reason specifically set out by the Supreme Court in *Carr v. State*, a filing by a prisoner is deemed filed on the date that it is received by the court.¹² This Court believes the Delaware Supreme Court holding that there is no "mailbox rule" for prisoners with respect to filing notices of appeal is instructive in determining whether the Motion is timely. Delaware Supreme Court Rule 6 and Court of Common Pleas Criminal Rule 35 contain similar mandatory requirements preventing review of a filing on the merits if it is not filed in a timely manner.

Because there is no "mailbox rule" for prisoners, the Motion is deemed filed on January 19, 2011 – one-hundred and ten days after the sentence was imposed. The Court, therefore, finds the Motion to be untimely.¹³

EXTRAORDINARY CIRCUMSTANCES

A motion for reduction of sentence or for correction of a sentence imposed in an illegal manner filed more than ninety days after imposition of sentence will only be considered by the Court if extraordinary circumstances exist. Extraordinary circumstances, for example, have been

¹⁰ Ct. Com. Pl. Crim. R. 35(b).

¹¹ *Carr v. State*, 554 A.2d 778, 780 (Del. 1989) ("In the absence of compelling policy reasons to support a change in our longstanding interpretation of Delaware law, we decline to adopt a separate prison mailbox rule.").

¹² *Id.* at 779-780.

¹³ *Defoe v. State*, 750 A.2d 1200, 1202 (Del. 2000).

found to exist where the defendant is unable to obtain proper medical care while incarcerated.¹⁴

However, extraordinary circumstances did not exist upon a showing of a defendant's commendable prison record or positive accomplishments during incarceration.¹⁵

This Court holds that the circumstances presented in this case do not amount to "extraordinary circumstances" as required by Court of Common Pleas Criminal Rule 35. Neither the original Motion nor any supplemental filing by Mr. Cresto's Attorney has alleged any fact that could be construed as an extraordinary circumstance under controlling law. Mr. Cresto's arguments that the sentence exceeds SENTAC guidelines and the Court committed error in allowing the victim's father to make a statement at the sentencing hearing are the type of arguments that are required by Court of Common Pleas Criminal Rule 35 to be filed within ninety days of imposition of the sentence.

CRESTO'S SUBSTANTIVE ARGUMENTS

Upon a review of the entire record and the arguments of Mr. Cresto and the State, the Court is satisfied that the substantive arguments of the Motion are not supported by the law. So, even if the mailbox rule did apply, the Court alternatively holds that the Motion lacks merit and is, therefore, denied.

Relief under Court of Common Pleas Criminal Rule 35 is available when the "sentence imposed exceeds the statutorily-authorized limits, [or] violates the Double Jeopardy Clause...."¹⁶ SENTAC guidelines do not control a sentencing court and a sentence imposed outside of the guidelines is not an illegal or improper sentence.¹⁷ Additionally, the Court is not bound by the

¹⁴ *State v. DeRoche*, 2003 WL 22293654 (Del. Super. Aug. 1, 2003).

¹⁵ *Upshur v. State*, 892 A.2d 1085 (Del. 2006) (trial court properly declined to consider positive accomplishments during incarceration); *Allen v. State*, 929 A.2d 783 (Del. 2007) (commendable prison record did not amount to "extraordinary circumstances" to excuse compliance with Super. Ct. Crim. R. 35(a)).

¹⁶ *Defoe*, 750 A.2d at 1201.

¹⁷ *See Mayes v. State*, 604 A.2d 839, 845 (Del. 1992) (a defendant has no legal or constitutional right to appeal a statutorily authorized sentence simply because it does not conform to the sentencing guidelines).

State's recommended sentence.¹⁸ Instead, the Court's power to sentence is controlled (and limited) by the applicable sentencing statute.¹⁹ To determine whether a sentence is legal, therefore, the Court must determine whether the sentence is within the statutory limits prescribed by the legislature. A sentence is also illegal if it is: (i) ambiguous as to the time and manner in which it is to be served, (ii) internally contradictory, (iii) omits a term required by statute, (iv) uncertain as to the substance of the sentence, or (v) a sentence which the judgment of correction did not authorize.²⁰

Here, the Court considered extensive amounts of information before sentencing Mr. Cresto, including the governing statutory limits. Prior to imposing the sentence, the Court stated six aggravating factors (mentioned above in the facts and procedural history section) on the record to justify its deviation from the SENTAC guidelines. The Court carefully considered the information before it and determined that Mr. Cresto is not amenable to probation and is in need of correctional treatment to curtail what has become a serious and incredibly long criminal history. While the sentence imposed was thirty days short of the maximum, it is still within the statutory range prescribed by the legislature.

Mr. Cresto also claims that the Court erred by allowing the victim's father to make an impact statement prior to sentencing. Mr. Cresto asserts that the victim's father should not have been given the opportunity to speak and the content of his statement included information that was not permissible to be considered prior to sentencing. A sentencing court has broad discretion to consider "information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted."²¹

¹⁸ *State v. Deston*, 2002 WL 338069 at *2 (Del Super. 2002).

¹⁹ *See Mayes*, 604 A.2d at 845 (citing *Ward v. State*, 567 A.2d 1296 (Del. 1989)).

²⁰ *See Defoe*, 750 A.2d at 1201; *Brittingham v. State*, 705 A.2d 577, 578 (1998).

²¹ *Mayes*, 604 A.2d at 842 (quoting *Lake v. State*, 494 A.2d 166 (Del. 1984)).

“Sentencing courts are specifically entitled to rely upon information regarding other, unproven crimes.”²² “However, a sentencing court abuses its discretion if it sentences on the basis of inaccurate or unreliable information.”²³ A sentence violates a defendant’s due process rights if it is based on demonstrably false information or information lacking minimal indicia of reliability.²⁴ A due process claim will only lie in regard to information relied upon by a sentencing court.²⁵

Mr. Cresto claims that the Court erred by considering the allegations of the victim’s father’s impact statement accusing Mr. Cresto of drug abuse. After expressing concern at the State’s recommended sentence, the victim’s father recommended that Cresto be ordered to complete a drug treatment program. Mr. Cresto’s Counsel offered a rebuttal after the impact statement. During rebuttal, the Court agreed that Cresto’s presentence investigation and criminal history do not indicate a drug abuse problem. Drug abuse was not mentioned as an aggravating factor prior to sentencing and the Court did not rely on the allegations of drug abuse in crafting Mr. Cresto’s sentence. The Court declined to impose any drug treatment as requested in the impact statement. The record demonstrates that the Court relied on the six previously stated aggravating factors, not on alleged drug abuse, when crafting the sentence which exceeded SENTAC guidelines.

This is not a case where the Court imposed an illegal, improper or, even, an unduly harsh sentence. The sentence falls within the limits established by statute. In addition, there is no claim that Mr. Cresto has been subjected to a violation of the Double Jeopardy Clause. Finally,

²² *Id.* at 843 (citation omitted).

²³ *Id.* (citing *Hamilton v. State*, 534 A.2d 657 (Del. 1987)).

²⁴ *Id.* at 843.

²⁵ *Id.*

there are no facts (either new facts or facts that were previously ignored by the Court) present here that support an argument that Mr. Cresto is entitled to a reduction of his sentence.

II. CONCLUSION

A motion for correction of a sentence imposed in an illegal manner must be filed within ninety days of sentencing, absent extraordinary circumstances. Mr. Cresto filed his motion one-hundred and ten days after sentencing and did not allege any extraordinary circumstances; therefore, the Court holds that the Motion is untimely. As set forth above, the Court has also considered the substantive arguments made in the Motion and holds that these arguments lack merit under Court of Common Pleas Criminal Rule 35. Accordingly, for these reasons, the Motion is **DENIED**.

IT IS SO ORDERED.

/S/ Eric M. Davis

Eric M. Davis
Judge